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THE IMPACT OF SEPTEMBER 11TH ON TORT LAW AND INSURANCE

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I. INTRODUCTION	809
II. THE LEGISLATIVE RESPONSE TO SEPTEMBER 11TH	811
A. <i>The Fund</i>	811
B. <i>Tort Recovery Alternative</i>	812
III. THE LEGISLATIVE RESPONSE TO FUTURE TERRORISM.....	813
IV. TERRORISM AND THE CHANGING DUTY TO PROTECT.....	815
V. THE HEIGHTENED STANDARD OF CARE	817
VI. DUTY AS A POLICY CHOICE	818
VII. HOW MUCH IS ENOUGH?	819
VIII. CONCLUSION.....	820

I. INTRODUCTION

September 11, 2001. That fateful day in our history has severely and permanently impacted our nation. The human loss at the points of impact left a deep wound in our national soul. The financial losses rippled outward from the zone of impact in the form of market instability to countless layoffs in aviation and other affected industries. Although we can rebuild the physical destruction caused by the attacks, the irreplaceable personal and

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financial losses demanded changes. The devastating nature of the tragedy called for an enormous human, financial and military response.

Our legislative branch quickly mobilized to redress some of the damage. Congress first passed the Air Transportation Safety and System Stabilization Act ("ATSSSA"),¹ which created a "no-fault" Victims' Compensation Fund, a \$15 billion assistance package for airlines, and a slate of mandated security measures. Expanding on the security measures for our homeland and our airports, Congress passed the Aviation and Transportation Security Act of 2001 ("ATSA")² shortly thereafter. More recently, Congress passed the Terrorism Risk Insurance Act ("TRIA")³ to guarantee, for a limited period, the costs of insurance claims from terrorism.

For a legal system founded upon basic principles of fairness and stare decisis, what does this legislative reaction to September 11th mean for the future of tort law and loss allocation? Has the government undertaken an appropriate role in response to the losses caused by terrorist acts or should our traditional tort system alone allocate such losses? On the one hand, the government's measures seem necessary to preserve our economy, save our air transportation system and insurance industry, and ensure compensation for victims. Opponents may criticize the measures as an unfair subsidy for affected industries that should be able to spread the risk to the consumers of their products and services.

Regardless of where one stands on that issue, the effects of the tragedy and the legislative response have altered tort law in this area. Since the attack, the government and media have warned the public of the likelihood and possible modes of the next terrorist attack. In response to these threats and warnings, airports, border patrols, and businesses have implemented extensive security measures. Each of us has safety and security concerns while traveling on an aircraft, attending a sporting event, visiting a national landmarks, using a bridge or being near a power plant.

Does our increased awareness of security, derived from past terrorist acts and the real threat of future terrorist activity in our

1. Pub. L. No. 107-42, 115 Stat. 230 (Sept. 22, 2001) (codified as amended at 49 U.S.C. § 40101).

2. Pub. L. No. 107-71, 115 Stat. 597 (Nov. 19, 2001) (codified as amended at 49 U.S.C. § 114).

3. Pub. L. No. 107-297, 116 Stat. 2322 (Nov. 26, 2002) (codified as amended at 15 U.S.C. § 6701).

homeland, raise the standard of care for businesses and property owners in providing security for employees and customers? If so, how extensive is the duty to provide such protection? What is a reasonable measure of security? What is a foreseeable use of a product? What is a foreseeable terrorist threat? These are among the questions businesses, property owners, and their insurers must find answers to based on the previously unforeseen becoming a reality.

II. THE LEGISLATIVE RESPONSE TO SEPTEMBER 11TH

A. *The Fund*

American citizens have been victims of terrorist activity many times in the past in situations not involving aviation – the Oklahoma City Federal Building bombing, the U.S.S. Cole, and the first World Trade Center bombing. Although each was a terrible tragedy, the damage, loss of life and effect on particular industries and our economy in those situations were not as great as the effects of September 11th. Hijackings and terrorism on international flights, such as the bombing of Pan Am Flight 103 over Lockerbie, Scotland, have also been risks that we have accepted and dealt with through the tort system. Our legal system traditionally handled damage caused by terrorist acts like any other mass disaster. The fault-based approach to liability and damages did not yield to the enormity of each tragedy.

But the attacks of September 11th – the hijackings out of our own airports of aircrafts full of United States citizens to be used as suicide missiles on our own national landmarks – did not represent a known or accepted risk and caused unprecedented damage, financial peril and insecurity. The government acted quickly. In eleven days it passed the ATSSSA⁴ into law establishing three major components: an airline assistance package,⁵ an assortment of mandated security measures,⁶ and the September 11th Victims' Compensation Fund of 2001 ("the Fund").⁷ Airports, airlines and aircraft manufacturers received protection through limitation of

4. Pub. L. No. 107-42, 115 Stat. 230 (Sept. 22, 2001) (codified as amended at 49 U.S.C. § 40101).

5. 49 U.S.C. § 101 (2002).

6. *Id.* § 501.

7. *Id.* § 401.

their liability to the extent of their liability insurance.⁸ As a countermeasure to that apparent limitation of liability and the risk of uncollectibility, the Fund was designed to ensure compensation for victims of the terrorist attacks.⁹

The Fund provides compensation to individuals who suffered physical injury, or to representatives of individuals who died as a result of the attacks,¹⁰ provided they do not seek restitution for claims through the courts.¹¹ There is no liability or negligence showing required to recover from the Fund.¹² It is a classic “no-fault” system, similar to no-fault automobile insurance covering medical expense and wage loss that many states, including Minnesota, have adopted. The Fund, however, prohibits civil recovery in court except from the terrorist entities.¹³

The Fund also includes several significant provisions that affect the amount of damages that can be recovered. For example, it prohibits punitive damages¹⁴ but allows the recovery of both “economic” as well as a broad range of “noneconomic” damages, including physical and emotional pain and suffering.¹⁵ In order to achieve consistency and predictability with respect to economic damages, Fund recovery sacrifices significant economic recovery for higher income earners¹⁶ and reduces recovery to the extent of collateral sources such as life insurance.¹⁷

B. Tort Recovery Alternative

While no-fault systems typically foreclose any alternative recovery, victims of September 11th can elect to forgo the Fund and seek traditional tort recovery. However, there are procedural and practical difficulties with doing so. For one, a plaintiff’s choice of venue is limited to the Southern District of New York.¹⁸ Further,

8. *Id.* § 408(a).

9. *Id.* §§ 401, 403.

10. *Id.* § 405(a)(2)(B)(i).

11. *Id.* § 405(c)(3)(B).

12. *Id.* § 405(b)(2).

13. *Id.* § 405(c)(3)(B).

14. *Id.* § 405(b)(5).

15. *Id.* § 405(a)(2)(B)(ii).

16. U.S. DEP’T OF JUSTICE, SEPTEMBER 11TH VICTIMS’ COMPENSATION FUND OF 2001, PRESUMED ECONOMIC AND NON-ECONOMIC LOSS TABLES § II.A.1 (2002), available at http://www.usdoj.gov/victimcompensation/vc_matrices.pdf.

17. 28 C.F.R. § 104.47(a) (2003).

18. 49 U.S.C. § 408(b)(3) (2002).

the limited liability of airlines, airports and manufacturers will at some point affect a plaintiff's ability to recover large judgments. Perhaps the most significant deterrent comes from the uncertainty of being the test case for future plaintiffs.

The risk of foregoing Fund recovery and the prospect of establishing liability for entities (other than terrorist entities) are daunting challenges. Obviously, the terrorists and their organizations are primarily to blame, but can sufficient facts be pled, discovered and proven to allocate fault to the airlines, the airport security companies and other potential defendants? While it is easy to theorize various claims and lay blame in the abstract, principles such as foreseeability and causation pose hurdles that the facts might not overcome. For example, does a security company breach its duty when it allows a passenger to board carrying a box-cutter that at the time was not prohibited on aircraft? Seemingly beyond the limits of causation are claims against the aircraft manufacturers, the airports, the FAA, security officials in the World Trade Center, the NY/NJ Port Authority, designers and builders of the World Trade Center, manufacturers of products contained in the buildings, and flight schools that trained terrorists.

Evidentiary issues also make proof of crucial facts very difficult. Other than cockpit voice recordings and cell phone calls, there is little evidence as to what weapons the terrorists used in the September 11th attacks. If claims against the airline are based on vicarious liability for hiring the security companies, and there is little or no real independent basis for the facts leading up to the impact with the World Trade Center, the challenge may be insurmountable. Yet, the heightened standard of care owed by airlines as common carriers to their passengers may nonetheless allow such claims to proceed.

These considerations, commentators suggest, will lead most victims of September 11th to seek compensation from the Fund.¹⁹

III. THE LEGISLATIVE RESPONSE TO FUTURE TERRORISM

Congress has also responded legislatively to the increased risk and loss allocation problem caused by terrorism following

19. E.g., Raymond L. Mariani, *The September 11th Victim Compensation Fund of 2001 and the Protection of the Airline Industry: A Bill for the American People*, 67 J. AIR L. & COM. 141, 182 (2002).

September 11th. It did this through the Terrorism Risk Insurance Act of 2002 ("TRIA"), which Congress approved in November 2002.²⁰ TRIA notes that the reasonable and predictable availability of insurance against catastrophic loss is crucial to economic growth and stability, and that the ability of the insurance industry to cover losses from any future terrorism likewise is crucial to economic recovery.²¹ However, given the difficulty of making statistically valid estimates of the probability and cost of future terrorist events, the insurance industry could understandably respond by either terminating coverage for terrorist events or dramatically increasing premiums—both of which could seriously hamper economic activity.²² The purpose of TRIA, therefore, is:

[T]o establish a temporary Federal program that provides for a transparent system of shared public and private compensation for insured losses resulting from acts of terrorism, in order to —

- (1) protect consumers by addressing market disruptions and ensure the continued widespread availability and affordability of property and casualty insurance for terrorism risk; and
- (2) allow for a transitional period for the private markets to stabilize, resuming pricing of such insurance, and build capacity to absorb any future losses, while preserving State insurance regulation and consumer protections.²³

In a nutshell, the government will partially cover the costs of insurance claims resulting from defined instances of terrorism for three years. For the first year, the insurance companies will have to cover an amount equal to 7 percent of their previous year's premiums, rising to 10 percent in the second year, and 15 percent in the third.²⁴ The remaining portion of the losses will be borne by the government up to a total payout cap of \$100 billion.²⁵ As one industry advocate explained, "[o]ur entire focus [in advocating for TRIA] was to increase the capacity and ability of private insurance

20. See Pub. L. No. 107-297, 116 Stat. 2322 (Nov. 26, 2002) (codified as amended at 15 U.S.C. § 6701).

21. 15 U.S.C. § 101(a).

22. *Id.*

23. *Id.* § 101(b).

24. *Id.* § 102(7) (A-D).

25. Deirdre Davidson, *Business Gave Insurers' Fight Stronger Focus How a Broad Coalition of Insureds Helped Turn Tide on Terrorism Bill*, LEGAL TIMES, Nov. 25, 2002, at 1.

2003] SEPTEMBER 11TH, TORT LAW, AND INSURANCE 815

to provide terrorism insurance We think this bill does that [I]t gets the market stabilized.”²⁶

TRIA means that for a limited time, the government will ultimately bear the risk of catastrophic losses caused by terrorism if the viability of the insurance industry is threatened. Like the Victims’ Compensation Fund of ATSSSA, TRIA ensures the compensation of victims and the preservation of the insurance industry. Unlike the ATSSSA Fund, TRIA places initial responsibility on businesses and their insurers under a fault-based approach to loss allocation. However, the government will still ultimately back up the enormous catastrophic losses.

IV. TERRORISM AND THE CHANGING DUTY TO PROTECT

The shifting responsibility for losses must be accompanied by ascertainable and understandable standards upon which that responsibility is assigned. Moreover, although the ways in which the losses occurred are unique and appalling, the framework in which to judge whether others in addition to the terrorists should bear responsibility is largely in place in modern American tort law.

Although Minnesota courts have yet to deal with terrorist attacks, the assignment of responsibility to business and property owners for the intentional acts of others has largely developed under the duty to protect. Minnesota Supreme Court Justice Simonett explained the practical difficulties in arriving at and specifying such a duty to protect:

[A] duty to protect against the devious, sociopathic, and unpredictable conduct of criminals does not lend itself easily to an ascertainable standard of care uncorrupted by hindsight nor to a determination of causation that avoids speculation. There is a difference between a landowner’s duty to sand a slippery step on his premises and his duty to contain a slippery criminal. In the latter instance, the landowner is being asked to take defensive measures against a third person not within his control, indeed, someone who tries to outwit any defenses.²⁷

As a general rule, Minnesota does not recognize a legal duty to control the conduct of a third person to prevent him from causing harm to another.²⁸ However, courts will find such a duty when the

26. *Id.* (quoting Jeffrey DeBoer, president of the Real Estate Roundtable).

27. *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 169 (Minn. 1989).

28. *Sulik v. Total Petroleum, Inc.*, 847 F.Supp. 747, 750 (D. Minn. 1994).

parties have a “special relationship,” such that one party has in some way entrusted his or her safety to the other.²⁹ Furthermore, even if a duty to protect exists, the duty only extends to “foreseeable” acts, an inquiry that is partially subsumed in the special-relationship inquiry.³⁰ Thus, a business or property owner’s liability for damage caused by the terrorist acts of another will depend upon both the owner’s relationship with the plaintiff and the foreseeability of the terrorist act.

Minnesota courts have found a “special relationship” in a very limited number of situations: certain hospital-patient relationships,³¹ landlord-tenant relationships,³² and most recently, in a merchant-customer relationship.³³ Among the factors establishing a special relationship are:

- the extent to which the plaintiff is vulnerable or deprived of opportunities for self-defense;
- the extent to which the plaintiff has entrusted his safety to the defendant;
- whether the defendant is in a position to protect the plaintiff;
- whether the property or business presents a particular focus or unique opportunity for criminals.³⁴

If there is no special relationship, there is no duty to protect.³⁵ However, if a special relationship is found, the defendant’s duty to protect only extends to foreseeable risks.³⁶ The test of foreseeability is whether the defendant is aware of facts indicating that the plaintiff was being exposed to an unreasonable risk of harm.³⁷ The extent of foreseeability shapes the nature of the defendant’s duty and sets the standard of care. As Justice Cardozo said, “[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk

29. *Id.*

30. *Spitzak v. Hylands, Ltd.*, 500 N.W.2d 154, 157 (Minn. Ct. App. 1993).

31. *See, e.g., Roettger v. United Hosp.*, 380 N.W.2d 856, 860 (Minn. Ct. App. 1986).

32. *See, e.g., Vermes v. Am. Dist. Tel. Co.*, 251 N.W.2d 101, 105-06 (Minn. 1977).

33. *Erickson*, 447 N.W.2d at 169.

34. *Id.* at 168-69.

35. *United Prod. Corp. of Am. v. Atlas Auto Parts, Inc.*, 529 N.W.2d 401, 403 (Minn. Ct. App. 1995).

36. *Spitzak v. Hylands, Ltd.*, 500 N.W.2d 154, 157 (Minn. Ct. App. 1993).

37. *Id.* at 158.

2003] SEPTEMBER 11TH, TORT LAW, AND INSURANCE 817

imports relation; it is risk to another or to others within the range of apprehension.”³⁸

Since September 11, 2001, the foreseeability of terrorism – the “risk reasonably to be perceived” – has increased dramatically. The formerly unthinkable is now a distinct possibility. This heightened foreseeability has infused the duty to protect with a similarly heightened standard of care.

V. THE HEIGHTENED STANDARD OF CARE

September 11th has taught us that terrorism can cause widespread damage in unique, unexpected ways. The media regularly puts the public on notice and has heightened our awareness of possible terrorist threats to air travel, nuclear power plants, treasured sites and landmarks, communication systems, and environment. Our government has responded to the nation’s demand for preparedness at least with regard to aviation and transportation. In the Aviation Security and Transportation Security Act of 2001, specific security measures have been implemented: baggage screening, federalization of the aviation security work force, bag matching, air marshals, cockpit protection, National Guard security at airports, and carry-on restrictions.³⁹ Because we are now more cognizant of, and have mandated security against, terrorist activities, will responsibility be accordingly apportioned when that security is breached in the future?

Our heightened awareness of terrorist and security risks (risks that are arguably more foreseeable today than prior to September 11, 2001) provides the opportunity to re-examine this question under the fact-specific inquiry of the special relationship test. Certainly we have heightened expectations of reasonable protective measures in the aviation setting. The heightened duty of care owed by airlines will be further raised when it comes to measures that are designed to protect against criminal acts. The legislated security changes will define the minimum standard of care owed, and the breach of which will yield liability, including negligence per se. But with the government stepping into a security role, courts will delineate the limits of discretionary immunity in this context. This

38. *Id.* (quoting *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928)).

39. Peter Dizikes, *Plane Truths Since Sept. 11, There Are Plenty of New Laws; But Is Flying Safer?* (March 11, 2002), at http://abcnews.go.com/sections/business/DailyNews/airsecurity_sixmonths020311.html (last visited January 15, 2003).

increasing awareness and preparedness will also affect the vulnerability to litigation of any business that congregates large numbers of people and any structure that is “high profile” or a desirable target.⁴⁰

With respect to the damages caused by September 11th, the temptation to turn hindsight into the standard of care by which all of the stakeholders are judged does not seem fair, both because of the unforeseeability of the attack and because the victims will be compensated by the Fund. An irony of September 11th is that although the manner of attack was unforeseeable, the World Trade Center “parking ramp” was previously the target of a terrorist act – the first terrorist bombing in 1993. It seems a stretch to argue that September 11th was foreseeable in light of the first World Trade Center bombing, and even more difficult to argue what the standard of care required. However, the future will be less forgiving, and courts will be more inclined to view terrorist threats as foreseeable, particularly when the cost of prevention or minimizing harm is not onerous.

VI. DUTY AS A POLICY CHOICE

The existence of a business or property owner’s duty of reasonable care to protect against foreseeable terrorist threats will also depend on various policy considerations, including a balancing of costs and benefits. As the Minnesota Supreme Court explained:

Presumably, we do not live in a risk-free society; if this is so, a cost-benefit analysis is unavoidable. To post security guards at each parking ramp level 24 hours a day might be the most effective crime deterrent, but the cost may be prohibitive for both the property owner and the customer The question of how much security is adequate raises, therefore, the further question of how much risk is an acceptable risk for members of the public.⁴¹

In Minnesota, any decision to expand on the duty owed by property and business owners must recognize that not all terrorist or criminal activity is preventable. It is difficult to imagine a reasonable way to guard against the theft and use of a small plane loaded with explosives and crashed to destroy a stadium or mall. A cost-benefit analysis would counsel against imposing continuous

40. Ed Bethune et al., *What’s Expected Now: The ‘Reasonable Man’ Standard for Liability Is Much Higher Since Sept. 11*, LEGAL TIMES, Feb. 4, 2002, at 24.

41. *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 169 (Minn. 1989).

monitoring of all small aircraft for this purpose where the financial impact on the general aviation industry is already precarious and the public would be asked to absorb the increased costs incurred by the government. On the other hand, if the imposition of a duty would yield procedures that prohibit access to ventilation systems in prominent structures, or that plan and train for the orderly evacuation of a building, and the expense is justifiable, the cost-benefit analysis should not prohibit the duty. The emphasis in the standard should be on the practicality of minimizing injury and damage that could have been limited or prevented even where the initial act or impact could not have been.

Interestingly, the precautionary security measures and disaster plans that businesses are implementing derive from what they perceive as a real threat. It is good business to be prepared and to protect your employees and customers. This precautionary conduct is driving the emergence of a duty and shaping the contours of the standard.

Perhaps the “next attack” scenario will involve circumstances beyond the reach of foreseeability. But in the wake of September 11th and the frenzied discussions of security in the media, mall owners, entertainment venues, utility operators, office buildings and other public and private gathering places have been put on notice by the predictions of the media and the suspicions of experts and the government. The generic merchant-customer relationship which was previously indistinguishable in the eyes of the law from the situation “out on the street and in the neighborhood generally,”⁴² will be subject to reconsideration where that relationship focuses on the attractiveness of the location as a potential terrorist target. If a parking ramp presented a particular focus and unique opportunity for criminal activity justifying “some duty” before the age of homeland terrorism, this new world we live in demands a greater one.

VII. HOW MUCH IS ENOUGH?

A business or property owner seeking to ascertain what security measures are required, and at what cost, faces a difficult task. The goal of the law in this area is to determine what measure of protection would be satisfactory or reasonable and to assign responsibility for damages proximately caused by the breach of

42. *Id.*

those reasonable, expected measures. Obviously, the standard of care depends on the circumstances confronted by each business or property owner. How much preparation and security would satisfy this duty is dependent on the unique circumstances involved. Some general guidance can be found in language from the Minnesota Supreme Court, which could easily be applicable to a case emanating from a future terrorist attack:

The operator or owner of a [_____] has a duty to use reasonable care to deter criminal activity on its premises which may cause personal harm to customers. The care to be provided is that care which a reasonably prudent operator or owner would provide under like circumstances. Among the circumstances to be considered are the location and construction of the [_____] , the practical feasibility and cost of various security measures, and the risk of personal harm to customers which the owner or operator knows, or in the exercise of due care should know, presents a reasonable likelihood of happening. In this connection, the owner or operator is not an insurer or guarantor of the safety of its premises and cannot be expected to prevent all criminal activity.⁴³

Because such a standard will be applied by judges and juries who live in the very same society in which these risks have come to life, the risk of liability based upon what, in hindsight, would have avoided a particular tragedy, will always be present.

VIII. CONCLUSION

Imperfect as the system is, it incorporates familiar guideposts to the assignment of financial responsibility, such as the special relationship test and the concept of foreseeability, but still allows for the consideration of individual circumstances. This return to the fault-based approach of loss allocation from the “no-fault” Fund created after September 11th reflects the emerging awareness and risk of terrorism in our homeland. The government’s guaranty against the catastrophic losses of large-scale terrorism, however, also assures that victims will not go without compensation. Although in the end the taxpayers may carry the burden, freedom is priceless.

43. *Id.* at 169-70.